Supreme Court, U.S.
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No. 98-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BRIAN KEITH STUART, a minor, by his natural Guardian and next friend Pamela Jean Craven; PAMELA JEAN CRAVEN, individually; PAULA KAIRDOLF; ERROLL M. KAIRDOLF, as parents and natural guardians of Michella Renee Kairdolf, a minor; PAULA KAIRDOLF, individually; ERROLL M. KAIRDOLF, individually, on behalf of themselves and all others similarly situated,

Petitioners,

v.

AMERICAN CYANAMID COMPANY, a wholly owned subsidiary of American Home Products Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit (the "Second Circuit") properly affirmed the district court's grant of summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure to Respondent American Cyanamid Company ("Respondent" or "Cyanamid"), on the grounds that the applicable state repose and limitations periods of the states of Nebraska and Louisiana respectively bar the product liability claims asserted by Petitioners Pamela Jean Craven and Paula and Erroll Kairdolf, on behalf of themselves and their minor children (collectively "Petitioners"), in this federal court action based solely on diversity of citizenship jurisdiction.

STATEMENT PURSUANT TO RULE 29.6

Cyanamid hereby states that it is a subsidiary of American Home Products Corporation.

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APPENDIX

Appendix A — Federal Rule of Civil Procedure 56 . 1a

STATUTES INVOLVED IN THE CASE

The federal statutes and regulations listed by Petitioners as involved in this case — the Public Health Act, the Food Drug and Cosmetic Act and regulations regarding the licensing of oral polio vaccine — have no direct bearing on their petition for a writ of certiorari (the "Petition"). The only federal law directly implicated in the Petition is Rule 56 of the Federal Rules of Civil Procedure, which Petitioners contend was improperly applied. The text of Rule 56 is set forth in Respondent's Appendix.

STATEMENT OF THE CASE

There is no basis for granting the Petition in this case. This case involves no federal question and thus does not warrant Supreme Court review. It is a diversity action in which Petitioners asserted a multitude of traditional state law product liability tort claims that were dismissed on the threshold state law ground that they were untimely under Nebraska's ten-year statute of repose for product liability actions and Louisiana's one-year rule of prescription for delictual actions, respectively.

In seeking to capture this Court's attention, Petitioners contend that this case involves the extension of this Court's holding in *Berkovitz v. United States*, 486 U.S. 531 (1988) — that the federal government is not automatically immune from state law tort suits alleging that an administrative agency exceeded its authority in licensing certain oral polio vaccine — to drug manufacturers, such as Respondent, that were the recipients of licenses that Petitioners claim should not have been issued. Petition at 14. *Berkovitz*, however, has absolutely no relevance to this Petition. The courts below never considered, nor needed to consider, the question of whether a vaccine manufacturer may be subject to a state law tort suit arising out

of the federal licensing of certain oral polio vaccine, because the courts below held, at the threshold, that Petitioners' state law tort claims were time-barred. Petitioners' Appendix A.1, A.2.

Petitioners commenced a putative class action against Respondent in the United States District Court for the Southern District of New York on June 29, 1995, seeking damages for personal injuries to Brian Stuart and Michella Kairdolf allegedly caused by Respondent's oral polio vaccine in 1979 and 1983. Petitioners' Appendix A.1 at 2-4. The complaint asserts state law claims for strict liability, fraud, negligence and breach of warranty and predicates federal jurisdiction solely on diversity of citizenship. Petitioners' Appendix A.1 at 4. The district court dismissed Petitioners' claims, and the Second Circuit unanimously affirmed the dismissal. Petitioners' Appendix A.1, A.2.

Respondent had moved for summary judgment primarily on the ground that Petitioners' claims are time-barred under the applicable laws of Nebraska, where the Craven/Stuart Petitioners reside, and Louisiana, where the Kairdolf Petitioners reside. Petitioners' Appendix A.2 at 2-3. In the alternative, Respondent argued for partial summary judgment on the ground that the district court lacks subject matter jurisdiction over Petitioners' tort claims to the extent that they are based on alleged regulatory violations, since those allegations constitute an impermissible collateral attack on federal administrative licensing orders that certify Respondent's regulatory compliance. *Id.* When the district court granted summary judgment to Respondent, holding that Petitioners' claims were time-barred by state law, it expressly declined to address Respondent's alternative argument for partial summary judgment. Petitioners' Appendix A.2 at 3.

Petitioners appealed to the Second Circuit with the only question presented for review being whether Petitioners' claims were time-barred. The Second Circuit, limiting its decision to the issues presented for appeal, did not decide either the collateral attack question or Petitioner's argument, raised here but not before the Second Circuit, that a vaccine manufacturer should be subject to liability in tort for the federal government's alleged improper procedures in the licensing of a vaccine. Petitioners' Appendix A.1. Because these questions were not considered by the Second Circuit, they are not properly before this Court for review.

As the only issues on appeal to the Second Circuit and decided by that court were whether Petitioners' claims are time-barred, there is nothing here worthy of this Court's review and the Petition should be denied. In connection with those timeliness issues, Petitioners argue here that both the district court and the Second Circuit misapplied Rule 56 of the Federal Rules of Civil Procedure by supposedly "overlooking" the fact that Respondent had assumed the factual allegations of Petitioners' complaint to be true for purposes of its summary judgment motion. Petition at 11-13. Otherwise, Petitioners claim, those courts would not have found their claims time-barred. *Id.* In fact, neither court overlooked Petitioners' pleaded facts, but properly concluded that they did not raise a material issue with respect to the timeliness of Petitioners' state-based claims under the applicable laws of Nebraska and Louisiana.

For its part, the district court demonstrated its understanding and appreciation of Petitioners' assertions of "fraudulent concealment" by summarizing Petitioners' allegations at the beginning of its opinion:

> The common theme of plaintiffs' claims is that Cyanamid sold Orimune [oral polio vaccine] even

> though it knew or should have known that Orimune is a defective product that should not have been licensed by the Government, a fact plaintiffs claim was concealed until 1993.

Petitioners' Appendix A.2 at 2. Petitioners' failure to convince the district court of its "fraudulent concealment" tolling argument was not attributable to the district court's rejection of pleaded facts, but rather to the district court's proper appraisal that the facts that Respondent allegedly concealed were not material to the legal issue of timeliness under either Nebraska or Louisiana law. Because Petitioners' were admittedly aware of their respective injuries and the alleged cause of those injuries, the district court correctly held that their "fraudulent concealment" arguments were unavailing.[1] Petitioners' Appendix A.2 at 9-10, 12-13.

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1. Petitioners also claim herein, in connection with their argument as to a purported federal licensing question, that the affidavit of David K. McClintock (Petitioners' Appendix A.5), which sets forth the licensing history for Respondent's oral polio vaccine, confused the district court and the Second Circuit by supposedly contradicting facts admitted for purposes of the motion. The affidavit goes completely without mention or citation, however, in the timeliness opinions of the courts below, as it was not material, or even relevant, to timeliness. Respondent submitted the affidavit in connection with its collateral attack argument, which was not addressed by the lower courts, and only cited it in a background section of its brief to the Second Circuit. Moreover, the affidavit does not contradict any of the allegations in Petitioners' complaint (*compare* Petitioners' Appendix A.5 with A.8), as the complaint nowhere disputes that Respondent received licenses from the federal government for its vaccine and, in fact, acknowledges that Respondent was licensed (*see* Petitioners' Appendix A.8 at 8 (¶¶ 75-76)).

The focal point of Petitioners' appeal to the Second Circuit was that the district court had supposedly erred by overlooking that Respondent had "conceded" the factual allegations of the complaint for purposes of its summary judgment motion. That argument was featured prominently in the briefs and even prompted a follow-up submission to the Court. Fully apprised of this "concession," the Second Circuit specifically addressed and rejected Petitioners' "fraudulent concealment" argument as follows:

> Craven's argument that Cyanamid "conceded" that the fraudulent concealment tolled the statute of repose is also without merit. Craven asserts that when Cyanamid conceded, for the purpose of the summary judgment motion, that the facts in the Craven/Stuart/Kairdolf complaint were true, Cyanamid also conceded the complaint's legal conclusion that Cyanamid's fraudulent concealment tolled the statute of repose. We disagree. We read Cyanamid's "concession" to be nothing more than an acknowledgment that, for purposes of the summary judgment motion, no genuine issue of material fact existed. Cyanamid did not concede the legal conclusions that plaintiffs sought to draw from the undisputed facts.

Petitioners' Appendix A.1 at 9-10. Nevertheless, Petitioners persist in arguing to this Court that Respondent's factual assumptions were disregarded by the Second Circuit.

REASONS FOR DENYING THE WRIT

"A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 of the Rules of the Supreme Court. The types of reasons considered compelling by this Court necessarily involve "important question[s] of federal law." *See* Rule 10 of the Rules of this Court. There simply are no important questions of federal law present here. The Second Circuit's opinion involves only questions of state law, which will rarely constitute an appropriate subject of this Court's review. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Petitioners' request for review of the Second Circuit's decision by writ of certiorari should accordingly be denied.

I.

THE SUPPOSED MISAPPLICATION OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT A SUFFICIENT BASIS FOR THE GRANT OF A WRIT.

Petitioners' first argument for a grant of a writ of certiorari is that the Second Circuit *misapplied* the standards governing Rule 56 summary judgment motions, as pronounced by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), in supposedly failing to appreciate that certain facts were assumed as true by Cyanamid for purposes of its summary judgment motion. Petition at 11-13. This Court has made clear in its Rule 10 that it disfavors hearing questions of precisely this type, by stating that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Moreover, the premise of Petitioners' argument is patently incorrect. As set forth above, the Second Circuit expressly took

into account the pleaded facts that Respondent did not contest for purposes of its motion, but disagreed with Petitioners as to the legal significance of those facts under Nebraska and Louisiana law. Because Petitioners' admittedly were aware of their injuries and the alleged cause of their injuries, they could not avoid Nebraska's ten-year product liability statute of repose or Louisiana's one-year rule of prescription for "delictual" actions or torts. Respondent's alleged concealment of regulatory violations is simply not material to the accrual of Petitioners' claims under Nebraska and Louisiana state law, as the courts below held.

Under Nebraska law, a defendant who fraudulently conceals a material fact necessary to the accrual of a cause of action against him may be equitably estopped from raising the statute of repose as a defense. Petitioners' Appendix A.1 at 8. This doctrine requires that the defendant has concealed facts that would have put the plaintiff on notice of any cause of action. *Id.* Petitioners were on sufficient notice of a claim, pursuant to Nebraska law, once they knew that Brian Stuart was injured and that his injury was related to the ingestion of Respondent's oral polio vaccine. *Id.* Thus, Respondent's non-disclosure of alleged regulatory violations was not material to the question of whether Petitioners were on notice and did not estop Respondent from raising a statute of repose defense under Nebraska law.

Under Louisiana law, the one-year period of prescription for delictual actions accrues once the plaintiff has a reasonable basis to pursue a claim against a specific defendant. Petitioners' Appendix A.1 at 11. In actions requiring allegations of medical causation, the one-year period begins to run once the plaintiff has actual or constructive knowledge of the causal connection between the medical treatment and the injury. *Id.* Petitioners were admittedly on notice of the alleged causal connection

between Respondent's oral polio vaccine and Michella Kairdolf's injury at least seven years before this action was commenced. *Id.* Thus, Petitioners' claims were untimely under Louisiana law, and Respondent's alleged concealment of regulatory violations was not material to the prescription period under Louisiana law.

As a result, there was no misapplication of Rule 56 by the courts below, and even had there been, such a misapplication of an established procedural rule would not constitute a sufficient ground for the grant of a writ of certiorari.

II.

BECAUSE THE SECOND CIRCUIT'S DECISION RESTS ON STATE LAW GROUNDS ALONE, THE WRIT SHOULD BE DENIED.

Issues of state law will rarely constitute an appropriate subject of this Court's review. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). The Second Circuit's decision in this case rests purely on state law grounds, on the threshold finding that Nebraska's product liability statute of repose and Louisiana's rules of prescription for delictual actions bar Petitioners' tort claims. Petitioners' Appendix A.1. The writ should therefore be denied.

Petitioners argue, as point II of their Petition, that this Court should grant the writ to consider the question of whether a vaccine manufacturer may be held liable in tort for receiving a federal license to manufacture and release vaccine that the responsible administrative agency allegedly should not have issued. Petition at 13-18. No such federal licensing question was addressed by the courts below. "This Court usually will decline to consider questions presented in a petition for certiorari that

have not been considered by the lower Court." *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988). There is no reason to depart from that practice in this case.

Moreover, review of Petitioners' federal licensing question would be entirely advisory, as Petitioners' tort action against Respondent, whether or not it may properly contain allegations of federal licensing violations, still fails on the threshold ground that it is time-barred under state law. Resolution of the federal licensing question will not revive Petitioners' stale tort claims. Thus, there is no case or controversy as to the federal licensing question and no basis for Supreme Court jurisdiction. *See Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: March 10, 1999

Respectfully submitted,

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APPENDIX

APPENDIX A — FEDERAL RULE OF CIVIL PROCEDURE 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the

whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Appendix A

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

* * * *